IN THE

Supreme Court of the United States

OCTOBER TERM 1943

No. 32

In the Matter

of the

Petition of KABUSHIKI KAISHA KAWASAKI ZOSENJO, Owner, and KAWASAKI KISEN KABUSHIKI KAISHA, Bareboat Charterer of the Steamship "VENICE MARU", for Exoneration from and Limitation of Liability.

CONSUMERS IMPORT CO., INC., et al.,
Cargo Claimants-Petitioners,

KABUSHIKI KAISHA KAWASAKI ZOSENJO and
KAWASAKI KISEN KABUSHIKI KAISHA,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENTS' REJOINDER TO PETITIONERS' REPLY BRIEF

GEORGE C. SPRAGUE,
Counsel for Respondents.

CASES CITED

TEXTS

IN THE

Supreme Court of the United States

OCTOBER TERM 1943

No. 32

In the Matter

of the

Petition of KABUSHIKI KAISHA KAWASAKI ZOSENJO, Owner, and KAWASAKI KISEN KABUSHIKI KAISHA, Bareboat Charterer of the Steamship "VENICE MARU", for Exoneration from and Limitation of Liability.

CONSUMERS IMPORT CO., INC., et al.,
Cargo Claimants-Petitioners,

KABUSHIKI KAISHA KAWASAKI ZOSENJO and
KAWASAKI KISEN KABUSHIKI KAISHA,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENTS' REJOINDER TO PETITIONERS' REPLY BRIEF

This rejoinder is filed pursuant to leave of the Court, granted on argument of the cause on October 21.

Petitioners' position (reply brief, 36) that the words of this Court in *The City of Norwich*, 118 U. S. at page 503, commencing with the sentence, "To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles", merely meant that the owner's interest

in the vessel on a subsequent voyage after fresh capital had been added was not liable under the limitation statute, is *untenable.*

This Court had already discussed and decided two questions before using the language in the paragraph quoted at page 6 of my main brief, namely:

(1) The time and place where the value of the ship was to be taken for limitation purposes;

(2) Whether petitioners were to account for insurance monies received.

It then passed to a third question which it stated at page 502 as follows:

> *"It is next contended that the act of Congress does not extend to the exoneration of the ship, but only exonerates the owners by a surrender of the ship and freight, and, therefore, that the plea of limited liability cannot be received in a proceeding in rem."*

It was in answer to this contention that it used the language at page 503 which I quoted. The fact that this Court incidentally mentioned the matter of repairs and betterments in a few brief sentences between the statement of the contention on page 502 and the answer thereto on page 503 does not mean that such answer referred merely to the matter of repairs and betterments which it had already discussed in answering the question of the time and place where the value was to be taken. There can be no doubt that the quoted language was in answer to the specific contention that the "plea of limited liability cannot be received in a proceeding in rem". Following the language quoted by me at page 6 of my main brief, the Court amplified its holding as follows:

> *"'His* [owner's] *property is what those who deal with him rely on for the fulfilment of his obligations. Personal arrest and restraint, when resorted to, are merely means of getting at his property. Certain parts of his property may become solely and exclusively liable for certain demands, as a ship bound in bottomry, or*

subject to seizure for contraband cargo or illegal trade; and it may even be called the 'guilty thing'; but the liability of the thing is so exactly the owner's liability, that a discharge or pardon extended to him will operate as a release of his property" (p. 503).

The suggestion at page 14 of petitioners' reply brief that Senator Hamlin's statement, "His vessel is in hazard, in any event", meant that *in rem* liabilities were not being extinguished, is unwarranted. These words referred to the condition sought to be remedied by the fifth section of the Act, which provided that a demise charterer should be deemed an owner within the terms of the Act, as clearly appears from the context. The full quotation is as follows:

> "The fifth section provides that where A charters the vessel to B, he shall not be held liable for the debts of B. The principle may be illustrated in this way: If I should loan a horse and carriage at a livery stable, as the law now stands, the owner of that livery stable would not be liable for any malfeasance I might do. *But as the law now stands in relation to the owners of vessels, the owner is liable for the acts of the person who may charter his vessel. His vessel is in hazard in any event. His fortune may be lost; and after all that, as the law now stands, you make him responsible for the debts and liabilities of the person to whom he has chartered his vessel.* By parity of reason you make the owner of the livery stable liable for the injury I might occasion to an individual when driving the horse which I have loaned from him" (23 Congl. Globe, p. 715, 2d col.).

Contrary to petitioners' contention, this quotation clearly shows that the purpose of the fifth section was to eliminate any lien on a vessel, while under demise charter, for the act of the charterer where such act was within the exemption of the Fire Statute. That was the situation at bar.

The English cases discussed at pages 3 to 6 of petitioners' reply brief which were cited by Judge Hough in

his decision in *Gaus S. S. Line* v. *Wilhelmsen* (*The Themis*), 275 F. 254, lend no support to petitioners' contention. They all involved *time charters* of vessels (*not demise charters as in the cause at bar*) and the only question was whether or not the bills of lading bound the general owner *in personam*. *No actions in rem were involved.*

> *Tillmans & Co.* v. *S. S. Knutsford, Ltd.*, L. R. 1 K. B. [1908] 185; affirmed 2 K. B. 385 [1908] (C. A.), 406; affirmed 1908 A. C. 406 (H. of L.),

was a suit against the general owner of the vessel on four bills of lading all of which contained the printed words "*for the captain and owners*" under the signature; three of such bills of lading were signed by the captain and one by the time charterers. The charter party provided that

> "The captain (although appointed by the owners) shall be under the orders and direction of the charterers as regards employment, agency, or other arrangements; and the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading by the order of charterers * * *" (p. 187).

The trial court held that the defendant owner was bound, by all four of the bills of lading, to the shipper of the cargo and this was affirmed by the Court of Appeal and the House of Lords. In the Court of Appeal (judgment by Kennedy, L. J.) it was said:

> "It does not lie in the mouth of the defendants to deny the authority of the signature as one made on behalf of the owners and captain, because they have themselves by the contract agreed that the captain shall act as the charterers shall direct, and therefore the signature which the charterers have made as on behalf of the owners and captain must, I think, be treated, when they are sued by the shippers who put their goods on board, as a signature which they cannot repudiate, because they gave the charterers, in the express terms of their contract, the right of directing the signature to

the document to be made, and must be taken impliedly to have given, both as against the captain and against themselves, an authority to the charterers to sign, on behalf of either or both of them" (pp. 406-7 of 2 K. B. 1908).

In the House of Lords in the judgment by the Lord Chancellor (Lord Loreburn) it was said:

> "The other point namely, that one of the bills of lading was signed by Messrs. Watts [charterer] instead of the captain is destitute of validity in law and even more destitute—to my mind—of merits. *If the captain had been directed to sign it he would have been obliged to sign it*" (p. 408 of 1908 A. C.).

In the judgment by Lord Dunedin in the House of Lords, it was said:

> "The only point remaining is whether the appellants are bound in respect of the fourth bill of lading. I am content with the judgment of Channell, J. I do not think that any new and dangerous liability, as was urged, is being imposed on owners, because it must be clearly understood that this was a bill of lading which the master could rightfully have been called on to sign" (pp. 410-411 of 1908 A. C.).

A similar state of facts is to be met with in *Wilston S. S. Co. Ltd.* v. *Andrew, Weir & Co.*, 31 Times Com. Cas., 111, cited at page 6 of reply brief. The Court found that the bill of lading was the contract of the ship owner, not the charterer.

In *The Manchester Trust Co. Ltd.* v. *Furness Withy & Co.*, 8 Asp. M. C. 57 (Court of Appeal), cited at p. 5 of reply brief, the vessel was under a time charter (not a demise) providing: "The captain and crew, although paid by the owners, shall be the agents and servants of the charterers for all purposes, whether of navigation or otherwise under this charter. In signing bills of lading it is expressly agreed that the captain shall only do so as agent for the charterers * * *." The master signed bills of lading for coal loaded at Cardiff consigned to Rio de Janeiro.

The charterers endorsed these bills of lading to the plaintiff and then induced the master to alter the destination of the ship to Buenos Aires and to deliver the cargo to themselves. The plaintiff sued the owners of the ship for non-delivery of the cargo and recovered. Judgment for the plaintiff was affirmed on appeal. In the judgment in the Court of Appeal by Lindley, L. J., it was said:

> *"The plaintiffs, who are holders of the bill of lading, rely upon the general rule of law that, prima facie at all events, a bill of lading signed by the master is signed by the master as the servant or agent of the shipowner. Of course in the ordinary course of business that is so.* * * * I cannot regard all these clauses [in the charter party] taken together without coming to the conclusion that the true view is that the master was and continued to be in fact the servant of the owners, subject to a stipulation that as between the owners and the charterers the charterers should treat him as their servant and indemnify the owners from the consequences of what the captain might do as regards signing bills of lading and so on. Now if that is the true view to take, that ends the question" (pp. 60-61).

In the judgment of Lopes, L. J., it was said:

> *"The question which we have to decide and which determines everything is this, whose servant was the master when he signed the bill of lading? Was he the servant of the charterers or of the owners? I have no doubt that as regards third parties, the master was the servant of the owners. They had hired him, they paid him, they alone could dismiss him"* (p. 62).

In the judgment by Rigby, L. J., it was said:

> "I am of the same opinion and I have very little to add. *I think the real question here may be said to be, have the shipowners—by which, of course, I mean the permanent owners, the absolute owners—given up altogether the possession and control of the ship to the charterers? I think it is impossible to read the charter without seeing that they had in many cases, at any rate, reserved to themselves the possession and control*

through the master—cases that may occur almost at any moment during the whole of this time charter" (p. 62).

In the above cases, both of which were *in personam*, the shipowner was held liable because the master remained its servant. They were decided purely on the principles of master and servant.

The Home, Fed. Cas. 6657, referred to at pages 23 and 29 of the reply brief, supports respondents', rather than petitioners', contention. *It was an action for supplies furnished on the order of the charterer of the vessel who* thereafter was adjudicated a bankrupt and made a composition with creditors to which libelant assented. Libelant thereafter sued the vessel and the Court held that its assent to the composition with the charterer's creditors did not release its lien against the vessel. The Court said, however:

> "*Had the supplies in this case been furnished upon the order of the owners, there would be reason for insisting that the claim against the owner and the lien upon his property was but a single debt, of which the lien was but an incident, and that the release of one might operate as the discharge of the other;* but there are in fact three independent though not joint debtors in this case, viz.: The charterer, the vessel, and the master, and the release of one does not impair the remedy against the others. The case does not differ from that of a debt against the maker of a note, secured by an indorsement, in which case it is now settled that the act of a creditor consenting to a composition does not discharge the surety" (pp. 446-7 of 12 Fed. Cas.).

It is noteworthy that General Admiralty Rule XII mentioned by Brown, D. J., in the above case, concerning the remedy of a material man or one furnishing supplies or repairs to a vessel, has since been amended to provide that the "libelant may proceed in rem against the ship and freight and/or in personam against any party liable". It is now Rule XIII.

The words of this Court in *The Scotland*, 105 U. S. 24, at p. 35, and in *Norwich Co.* v. *Wright*, 13 Wall. 104, at p. 127, quoted by petitioners in their reply brief (pp. 17, 35), refer only to the limited liability sections of the Act of 1851. Both were collision cases and involved limitation only. It is true that the limited liability provisions of the Act of 1851 (Sections 3 and 4) incorporated "the rule of the general maritime law on this point" but not so Section one dealing with liability for fire, which merely adopted an English statute (26 Geo. III, c. 86, sec. 2), which in no way related to the general maritime law. Attention was called to this difference in parentage between the first and the third and fourth sections of the Act of March 3, 1851, by Judge Goddard in *The Cabo Hatteras*, 5 Fed. Supp. 725, at p. 726.

While broad language is used in *Schooner Freeman* v. *Buckingham*, 18 How. 182, 189, cited at pages 26-27 of the reply brief, the holding does not sustain petitioners' position. The general owner of a vessel had given possession thereof to an owner *pro hac vice* who induced the captain to sign bills of lading for cargo which was never loaded aboard. The libelants advanced money on these bills of lading and arrested the ship under a libel *in rem*. It was held that there was no lien on the vessel and the decree for libelants below was reversed because there had never been any such union of cargo and vessel as would create such a lien. The Court said:

> "We are of the opinion, that under our admiralty law, contracts of affreightment, entered into with the master, in good faith, and within the scope of his apparent authority as master, bind the vessel to the merchandise for the performance of such contracts, wholly irrespective of the ownership of the vessel, and whether the master be the agent of the general or the special owner" (p. 189).

As I read this, *it means that the effectiveness of the master's contract to bind the vessel in rem upon cargo being loaded aboard depends upon whether he was either the agent of the general owner or the agent of the special owner when making the contract.*

On the argument I was asked by Mr. Justice Frankfurter whether I knew of any case in the House of Lords holding that, under the terms of the British Fire Statute, an owner's ship was exonerated *in rem* when the owner was exonerated *in personam*. I answered that I knew of no such case. The cases that have reached the House of Lords concerning the British Fire Statute, insofar as I have been able to ascertain, have been *in personam*. This is probably due to the fact that in England "jurisdiction of Courts of Admiralty *in rem* in matters arising out of contracts for the carriage of goods depends upon recent statutes". *Carver, Carriage of Goods by Sea*, 8th Ed., 1938, Chap. XIX, pp. 963, 965, etc., where these statutes are quoted. In general such jurisdiction, according to the "Judicature (Consolidation) Act, 1925, s. 22 (1) (reproducing previous legislation)" as quoted by Carver, extends to "any claim (1) arising out of an agreement relating to the use or hire of a ship; (2) any claim relating to the carriage of goods in a ship; (3) any claim in tort in respect of goods carried in any ship; *unless it is shown to the court that, at the time of the institution of the proceedings any owner or part owner of the ship was domiciled in England*" (id. p. 965).

Carver, the great British authority on carriage of goods by sea, continues after the above quotation to say:

> "The object of the section of the Admiralty Court Act, 1861, now superseded by the above, was thus described by Dr. Lushington: 'The statute is remedial. The short delivery of goods brought to this country in foreign ships, or their delivery in a damaged state, the goods being the property of British merchants, was frequently a grievance—an injury without any practical remedy; for the owners of such vessels being resident abroad, no action could successfully be brought

in a British tribunal, and to send the British merchant, who had sustained a loss, to commence a suit before a foreign tribunal, and probably in a distant country, could not be deemed a practical and effectual remedy. And this enactment, therefore, was intended to operate by enabling the party aggrieved to have recourse to the arrest of the ship bringing goods delivered short, or damaged, in cases where, from the absence of the defendant in foreign parts, the common law tribunals could not afford effectual redress' (i)" (p. 965).

And in Section 690 at page 970, the same authority says:

"It does not appear to have been decided whether the remedy *in rem* against the ship for damage to goods, or for breach of contract of carriage, is given in cases where there would be no right of action against the shipowner himself.

But it is at least open to doubt whether it was intended that the *res* of the shipowner should be liable to compensate wrongs for which he would not be personally answerable (k). And the provision in the Act of 1925, which limits the jurisdiction to cases in which there is no owner domiciled in England or Wales, appears to show that that result was not intended. For, otherwise, a difference of *liability* would be imposed on owners living abroad, and owners living in England.

Where the ship has been chartered, or let, to persons who are allowed to have the control of her for the time being, and who are personally liable for the claim which is made, the remedy against the ship is perhaps available, though her owners may not be liable. The point does not seem to have been decided. If in such a case the claim were based upon a maritime lien, the authorities show that the ship could be proceeded against (l). But as the claims we are con-

(i) Carver's note: "The St. Cloud (1863), 8 L. T. 54, at p. 55."

(k) Carver's note: "Cf. The Castlegate, 62 L. J. P. C. 17; (1893) A. C. 38; 7 Asp. M. C. 284; The Utopia, 62 L. J. P. C. 118; (1893) A. C. 492. See *infra*, sect. 701."

(l) Carver's note: "The Ticonderoga (1857), Swabey, 215; The Lemington (1874), 2 Asp. M. C. 475; The Tasmania (1888), 57 L. J. Adm. 49; 13 P. D. 110; The Ripon City, 66 L. J. P. 110; (1897) P. 226. Cf. The Seaboard (1903), 119 Fed. Rep. 375."

sidering do not give rise to maritime liens, the proceeding *in rem* must be justified, if at all, by the words of the Act; and it seems unlikely that those words were intended to give a remedy against the owners, in effect, which would not otherwise exist (m)."

And in Section 694 at page 975, the same authority says:

"694. The remedy in rem, then, given by the Admiralty Court Acts for claims arising under contracts of carriage, is not founded upon a maritime lien. But it enables the claimant to arrest and detain the property; and gives him a charge upon it, subject to other prior claims, from the time of the arrest. 'The object of the statute is only to found a jurisdiction against the owner who is liable for the damage, and to give the security of the ship, the *res*, from the time of the arrest' (k)" (p. 975).

While in Section 695 at page 976, the same authority says:

"695. It appears, then, that the remedies *in rem*, which we are discussing, can only be availed of against the ship and freight on the one hand, and against the cargo on the other, so long or so far only as they continue at the time of arrest to be the property of the person who is personally liable for the damage, or breach of duty complained of" (p. 976).

Inasmuch as the British Fire Statute, which is s. 502 of the "Merchants Shipping Act, 1894", is restricted to "the owner of a British seagoing ship", such an owner was usually found to be domiciled in England and, therefore, the Judicature Act, giving a right to suit *in rem* was inapplicable.

(m) Carver's note: "In the United States it appears to be the law that the *ship* is liable for the performance of contracts made by the master, within the scope of his apparent authority, whether he is acting as agent for the owner of the ship, or on behalf of the charterer, or other person who is allowed to have control of the ship for the time being: Hickox v. Buckingham (1855), 18 Howard, 182 (Supreme Court)."

(k) Carver's note: "The pieve Superieure (1874), L. R. 5 P. C. 482, p. 491."

The most recent decision of the House of Lords involving the British Fire Statute, *Louis Dreyfus & Co., Appellants,* v. *Tempus Shipping Company, Respondents* [1931] A. C. 726, shows the liberal spirit with which that Statute is interpreted. It was a suit by shipowners against cargo owners for general average contributions incurred as the result of a fire in cargo on board a ship and a counterclaim by such cargo owners for damage to their cargo in the fire which was alleged to have been caused by the ship's unseaworthiness. The trial court found that the fire was due to unseaworthiness and gave judgment against the shipowners on their claim for general average contributions and against the cargo owners on their counterclaim for damage to their cargo by fire.

The Court of Appeal [1931] 1 K B. 195, reversed the decision of the trial court on the shipowners' claim for general average contributions and affirmed its decision on cargo owner's counterclaim. The House of Lords affirmed the decision of the Court of Appeal, both in respect to the shipowners' claim and the cargo owners' counterclaim, [1931] A. C. 726.[1]

The statute under consideration was s. 502 of the Merchants Shipping Act, 1894,[2] reading as follows:

> "Liability of Shipowners:
>
> 502. The owner of a British seagoing ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases; namely,—
>
> (i) where any goods, merchandise or other things whatsoever taken in or put on board the ship are lost or damaged by reason of fire on board the ship;"

---

[1] This decision was considered and discussed by this Court in *Earle & Stoddart* v. *Wilson Line* (*The Galileo*), 287 U. S. 420, footnote 1 at p. 425.

[2] The British Merchants Shipping Act, 1894, 57 & 58 Vict., c. 60, is printed in Appendix III of *Scrutton on Charter Parties and Bills of Lading*, 14th Ed., pp. 537-549.

The House of Lords held this provision was broad enough not only to protect the shipowners from cargo loss by fire, but also affirmatively to collect general average contributions from cargo owners made because of said fire.

In the judgment by Viscount Dunedin, it was said:

> "Now s. 502 says that, if fire is the cause of the trouble, there is no actionable wrong committed by the shipowner, however much he may have caused the fire; and by decision (which here again I have already approved) this is explained to embrace fire when caused by unseaworthiness. Therefore in this case there is no actionable wrong in what the shipowner did, and consequently the answer to the exception is not a good one, just as was found in The Carron Park and Milburn" (pp. 738-9).

In the judgment of Lord Warrington of Clyffe, it was said:

> "In the present case the loss of or damage to the appellants' cargo happened by reason of fire on board the ship and without any actual fault or privity on the part of the respondents the shipowners. The shipowners were therefore completely freed from any liability to make good such loss or damage" (p. 741).

In the judgment of Lord Atkin, it was said:

> "The statute, then, is not dealing with average, but it is dealing with actionable fault, and, as the suggested defence to the claim for contribution is actionable fault of the claimant, the statute defeats such a defence" (p. 751).

This case expressly approved the decisions of the Court of Appeal in *Virginia-Carolina Chemical Co.* v. *Norfolk & American Steam Shipping Co.*, 1 K. B. 229, and *Ingram & Royle Ltd.* v. *Services Maritimes du Tréport*, 1 K. B. 541. In view of its liberal interpretation of the Statute can it be doubted that the Court would have exonerated the ship from liability had there been any such liability?

The Munaires, 12 F. Supp. 913, cited at page 20 of petitioners' reply brief, was in the Eastern District of Louisiana (within the Fifth Circuit) and the Court declined to follow the holding of its own Circuit Court of Appeals in the *Etna Maru,* 33 F. (2d) 232. One of counsel for petitioners herein was advocate for cargo owners in the *Etna Maru,* supra, and I was advocate for the ship. The holding of the Court in that case that the Fire Statute did not exonerate the owner's ship even where the owner was free from personal negligence was *sua sponte* and has never been followed in any other case. Petitioners have not attempted to justify the doctrine of that case in either their main brief, reply brief or argument herein. The main doctrine of the case was expressly disapproved by this Court, opinion by Mr. Justice Brandeis, in *Earle & Stoddart, Inc.* v. *Ellerman's Wilson Line, Ltd.* (*The Galileo*), 287 U. S. 420 (footnote 3 on p. 427), and cast doubt upon its holding that the Fire Statute did not exonerate a vessel from liability *in rem* by calling attention in the same note to *The Rapid Transit,* 52 F. 320. In view of this fact and of the otherwise continuous line of decisions in the lower federal courts, all involving suits *in rem,* in which the Fire Statute has been held to exonerate the ship, as well as its owner, from liability for cargo damage by fire, it is submitted that the doctrine for which the *Etna Maru* has been cited should be now expressly disapproved. The construction of the Fire Statute in the Circuit Court of Appeals below is in accordance with the uniform holding of the courts of that circuit since 1857 when *Dill* v. *The Bertram,* Fed. Cas. 3910, was decided by Judge Betts; this construction has been so well understood that the point is rarely raised in the courts of that circuit. This explains why in *The Salvore,* 60 F. (2d) 683, and *The Older,* 65 F. (2d) 359, there was no discussion of the point. The Circuit Court of Appeals below construed the Statute exactly as this Court had done in *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.,* 109 U. S. 578, cited at length in my main brief (pp. 13-15), where, in dealing with the effect

of a restraining order issued out of the United States District Court for the Southern District of New York in 1872 in a cause of limitation of liability and which, therefore, was in the nature of an *in rem* proceeding, it was held that, *"In all cases of loss by fire, not falling within the exception, the exemption from liability is total"* (p. 602).

No fiction of a master's contract of affreightment, separate and apart from that of the owner or bareboat charterer, which petitioners now raise in this Court for the first time should be allowed to obscure the realities of the case. The cargo's lien upon the ship does not in any case arise out of the making of a so-called "master's contract"; it arises out of the fact that the cargo was loaded on board the ship. There is no lien until the cargo has been loaded, no matter who signed the contract; there is a lien as soon as the cargo has been loaded no matter who signed the contract. *Krauss Bros. Lumber Co.* v. *Dimon S. S. Corporation*, 290 U. S. 117; *Osaka Shosen Kaisha* v. *Pacific Export Lumber Co.*, 260 U. S. 490; *The Saturnus* (C. C. A. 2d), 250 F. 407; *The Esrom* (C. C. A. 2d), 272 F. 266; *The Themis* (C. C. A. 2nd), 275 F. 254; *The Pognan* (D. C. S. D. N. Y.), 276 F. 418. The authority of the master has lessened as communication with his principal has become easier and quicker; it is not as great today as it was in 1834 when *The Phebe* (Fed. Cas. No. 11,064) was decided. A reversal of the decree below would be a change of the law as construed for the past 92 years and would be contrary to legislative intent.

October 25, 1943.

Respectfully submitted,

GEORGE C. SPRAGUE,
Counsel for Respondents.

(Emphasis throughout is mine.)